

**FLATHEAD COUNTY BOARD OF ADJUSTMENT
MINUTES OF THE MEETING
JULY 07, 2020**

**CALL TO ORDER
6:01 PM**

A meeting of the Flathead County Board of Adjustment was called to order at approximately 6:16 p.m. at the South Campus Building, 40 11th Street West, Suite 200, Kalispell, Montana. Board members present were Ole Netteberg, Gina Klempel, Tobias Liechti, Cal Dyck and Roger Noble. Mark Mussman represented the Flathead County Planning & Zoning Office.

There were 43 members of the public in attendance.

**APPROVAL OF
MINUTES
6:01 PM**

Klempel motioned, seconded by Noble, to approve the June 2, 2020 minutes as written.

The motion passed unanimously on a roll call vote.

**PUBLIC COMMENT
(Public matters that are
within the jurisdiction of the
Board 2-3-103 M.C.A)
6:02 PM**

None

**REMINGTON
(FCU-20-02)
6:04 PM**

A request by Ryan Remington on behalf of Randal Remington for a conditional use permit for a Manufactured Home Park that will include 13 spaces within the Willow Glen Zoning District. The applicant is proposing shared well and septic system for the lots and access would be from Willow Glen Drive. The property is located at 616 Willow Glen Drive. ***This agenda item was tabled at the May 5, 2020 meeting and the public comment portion has been closed.***

**APPLICANT
PRESENTATION
6:05 PM**

Ryan Remington, 19 Happy Hallow, explained the updates to the site plan which had been made. They had reduced it to an 8-lot subdivision. He discussed the shared well. He said if another well was needed, it would reduce the lots even more or they would possibly need to redesign. It was his understanding that the subdivision review would include a further in-depth process, which would address placement of wells and draining fields. This was just a hoop to jump through to get to that process. He explained the dimensions of the lot. He intended to contribute to making some affordable housing options, which was needed in the valley. There were similar projects nearby.

BOARD QUESTIONS
6:08 PM

Noble asked about whether the property was going to be owned by an individual owner and the applicant clarified that he intended to own the homes himself [and rent them out].

Noble further questioned about the wells and draining fields and they discussed in great detail the measurements and maps.

Liechti felt the project would have difficulty going through DEQ but it was not their job to deny the application based on well and septic. He questioned what the normal protocol for conditional use permit approval vs. subdivision review. Staff clarified the next level of review would require more specific information [in the development].

Dyck suggested they replace the “8 lot” description to state “multiple lot”, therefore allowing flexibility after going through all the red tape. Liechti felt it was pretty open ended, which was good.

**MAIN MOTION ON TO
ADOPT F.O.F.
(FCU-20-02)
6:14 PM**

Liechti made a motion, seconded by Netteberg, to accept Staff Report FCU-20-02 as Findings-of-Fact.

**ROLL CALL TO ADOPT
F.O.F.
(FCU-20-02)
6:00 PM**

Motion passed on a 5-1 roll call vote. Noble dissented.

**MOTION TO APPROVE
(FCU-20-02)
6:14 PM**

Liechti made a motion, seconded by Netteberg, to approve the FCU-20-02 application.

**ROLL CALL TO
APPROVE
(FCU-20-02)
6:15 PM**

Motion passed on a 5-1 roll call vote. Noble dissented.

**DISCLOSURE OF
CONFLICT OF
INTEREST
6:15 PM**

Klempel disclosed that she owned a gravel pit and asked the board if she should recuse herself. The board discussed it and felt it was not needed because she had nothing to lose or gain from this appeal.

Noble recused himself for a perceived conflict of interest as he had once worked on the gravel pit when it had been owned by the previous owner.

**CHAIRMAN EXPLAINED
PROTOCOL FOR
APPEALS
6:18 PM**

Dyck addressed the public and explained the protocol for an appeal.

**DONALD MURRAY ON
BEHALF OF CHARLENE
IANNUCCI
(APPEAL-20-02)
6:19 PM**

An appeal by Donald R. Murray on behalf of Charlene Iannucci, regarding a decision made by the Zoning Administrator determining that accepting, processing and forwarding to the Board of Adjustment a favorable report from the Flathead County Planning and Zoning Office, the application of Section 16 Family Limited Partnership (successor in interest to 'Tutvedt Family Limited Partnership') and Schellinger Construction Inc., seeking an amendment to Conditional Use Permit No. FCU-05-07, in order to remove from the said Conditional Use Permit condition #28 which prohibits asphalt and concrete batch plant operations.

**APPEALLANT
PRESENTATION
6:20 PM**

Donald Murray, with Hash, O'Brien, Biby & Murray, PLLP, represented the appellant. He presented the board and staff with chronology that provided the history of the property including a summary of the basis for the appeal. He understood that he was commissioned, by the appellant, to convince the board that the Planning Director had made a mistake in accepting the application. He preface that the county was lucky to have such a great planning director and, even though they disagreed sometimes, he wanted to express that Mussman was always professional, willing to listen, and he had the upmost regard for him.

The appeal was based on completeness and appropriateness. He explained the application was incomplete and lacked important detail. It should not have proceeded in processing because of that reasoning. He discussed this in great detail. He discussed that the application was inappropriate based on that they wanted to amend a condition in the original application, which was actually added as a prohibition to mitigate allowable use. He also felt it was inappropriate based on the litigation history and further explained the history of litigation behind the property. He explained there were two different conditional use permits and the later had nothing to do with the prohibition of FCU-05-07. He explained the consent decree; that if there was any disagreement, then they were to go back to the judge at the District Court for interpretation.

BOARD QUESTIONS
6:35 PM

Klempel questioned why the settlement agreement documents were not available from the courts and not retained in the file.. Murray was not sure how that happened and gave his idea of what could have happened and the reason why.

STAFF REPORT
6:36 PM

Mussman presented the memo along with the exhibits. He had read the descent decree and felt it was something, the way paragraph 3C read as well as 3D, that the applicant could come back and modify any of the conditions from any of the conditional use permits that were issued. He said the descent decree did remove all conditions attached to FCU-08-07. The conditions of the previous FCU-05-07 were also referenced in FCU-08-07. The conditions of FCU-05-07 were referenced in the descent decree. It all hinged on the new definition of gravel extraction. That was going through the process when the last litigation was also in the process and therefore the new definition had been taken into consideration.

He wanted to point out that appeals should state how the zoning administrator errored in interpreting the regulations. The descent decree was not part of the Flathead County Zoning Regulations, it was a completely different document. Whether or not the application was complete, the memo stated that it was ultimately was up to the BOA.

BOARD QUESTIONS
6:41 PM

Liechti asked about procedure and how they could accept an appeal on completeness being that they had not seen the application before. Mussman clarified that they were actually appealing the fact that Planning and Zoning had accepted the application and enabled it to move forward. Their argument was that, because of the descent decree, we should not have accepted it.

PUBLIC COMMENT
6:42 PM

Charlene Iannucci, 597 Clark Homestead lane, was the appellant. She had been a part of this process since its beginning and recapped the history of the conditional use permits and the application process. She said the West Valley Land Use Advisory Committee had brought to light things that the Planning Office had not known. She questioned what had not been addressed in the application along the details of the operation. She was concerned about fire control and that there was no mention of a plan or discussion with the fire chief. She said there was no mention of an evacuation plan for the neighbors. She questioned the negative traffic impact. She was concerned about the fumes from the batch plant. She was concerned about the continual operation of hours. She did not feel there was any mitigation. She was a part of the group that sued originally and lost. She discussed the descent decree and litigation history in detail. She discussed history of zoning. She did not believe the Planning Office should have ever accepted the application

Claire La Chappelle, 3580 Farm to Market Rd., spoke in opposition of the batch plant. She was concerned about the traffic impact and said trucks frequently ran the stop signs and the signage was not appropriate. She said they were all living on contaminated water. She said Tutvedts had gotten everything that they had tried to get. They were told no asphalt or concrete batch plants and here they were again 16 years later fighting the same thing. She discussed the property history and how Tutvedts had treated their neighbors. She did not understand how amendments could continue to take place without the proper protocol. She was concerned about the increase of traffic, increase of density, the logging, and the changes that were happening within West Valley. She was also concerned over the safety of the neighbors should there be an explosion.

Kurt Thompson, 100 Canola Rd., spoke in opposition of the batch plant. He discussed the history of the parcels. He said they should not even be here tonight.

Nugget Carmalt, 1925 Church Drive, spoke in opposition of the batch plant. She had a contaminated well. She was concerned about the truck traffic on Church Drive and expressed that it was the busiest truck traffic in the valley. She did not allow her children to ride their bike to the school because the traffic was so bad. She was in agreeance with Murray and did not know how the board could even entertain the idea after they had already fought this in the past. She was concerned about the increase of truck traffic. She asked that the board uphold what was in their neighborhood plan.

Linda Newgard, 905 Clark Dr., spoke in opposition of the batch plant. She asked the board to consider that the application was incomplete and was lacking information on fire protection, water safety, and traffic impact. At the WVLUAC meeting, the applicant clarified that there would be an additional 1000 trips per day of traffic. The subsequent CUP was insufficient in addressing traffic, water, and fire. She was concerned about the impact it would have on the school. She said there was no subsequent review on neighborhood impact by either the Planning Office and/or application. She pointed out that some of the findings of facts were, not only inadequate but in some cases, nonexistent. She asked that the board uphold the appeal.

Roger Brewer, 3025 Farm to Market Rd., had prepared a written comment and handed it in to the board.

Tammi Fisher with Fisher Law Firm, 502 2nd Ave E, wanted to provide

clarification on the original appeal. She explained that everyone was treated equally in the amendment process and any applicant, at any time, may ask for an amendment to their CUP. If there was a prohibition that prevented one applicant but allowed another to amend their CUP, it would be treating them unfairly in respect to equal protection. She continue to discuss equal protection rights in detail and in regards to the descent decree. If the request, or amendment is allowed, was up to the board. They could decide that there was or was not sufficient information to substantiate the request; which needed to be based on substantial evidence and underscoring findings of facts. She discussed the job of the board was to determine if the answers were sufficient but the administrator's job was to determine if they had answered the questions. She felt it would be a clear violation of equal protection if this applicant was treated any differently than other applicants. She believed that to be the reason why the zoning administrator went forward with this; because he was treating every applicant the same.

Susan Weber, 227 Rhodes Draw, discussed the WVLUAC and their recommendation of denial for the amendment of the conditional use permit. She was concerned about the negative environmental impact it would have and was in opposition of the batch plant.

Brett Tallman, 788 Lone Coyote Trail, spoke in opposition of the batch plant. He was concerned about the impact that it would have on the little kids and the toxins in the environment and the health issues that they cause.

Mayre Flowers with Citizens for a Better Flathead spoke in opposition of the batch plant. She handed out a letter for public comment and read it. She replied to the comment from Fisher and agreed that applicants needed to be treated equally and fairly. Where she disagreed was that, in the settlement, Tutvedt had given up the right to come in and ask for an amendment when they settled. She said that one of the main issues that they needed to address was if there was a conflict with the CUP moving forward. The handout addressed that question. If there was a conflict, then they had to go back to the court for clarification and interpretation. She suggested a series of finding of facts to present to the court to ask for guidance. She discussed the history of conditions that the BOA had made in the past and the litigation that followed. She stated the prudent thing to do was to uphold the appeal tonight and have them go back to the court to ask for mediation. She urged them to use the simple findings to rule that the administrator errored in receiving the application.

Cathy Nielsen, 3043 Farm to Market Road, spoke in opposition of the batch plant. She discussed her family history of being in the area. She did not

understand how the regulated uses were granted but if someone wanted to come in and change it and she did not approve of the heavy commercial use for an asphalt plant. She could not fathom that the best part of the valley could be polluted. The contaminated wells were pollution. She disagreed that anybody had a right to do that.

Jim Weber, 227 Rhodes Draw, spoke in opposition of the batch plant. He was new to West Valley but when he became informed of the proposal, and after reading the materials that were available, he was surprised that it was even allowed to come in this far. He had seen what this kind of thing would do to communities. He said the BOA had a responsibility to look after the community. He had sought advice from professionals who provided statistics, in which Mussman had no idea, and Tutvedts had no answers at the WVLUAC meeting. He did not move to Montana to be in an area that was controlled by greed and money.

Richard Dillon, 83 Wendt Way, spoke in opposition of the batch plan. He discussed his history of living in West Valley. He discussed the weather cell, bringing in wind and all the smells. He was concerned about toxins that would be in the air.

Marcy Roberts, 886 Lone Coyote Trail, spoke in opposition of the batch plant. She was concerned about the fire control hazard. She said the Kalispell City Fire Department and the West Valley Fire Department were not equipped for a fire or explosion and they had a territory battle [of that area]. She said it was an ongoing battle but she did not want it to be a part of *her* battle.

APPEALANT REBUTTAL
7:35 PM

Murray said they were focused tonight on the technicality of the appeal and whether it was appropriate for the Planning Office to accept the application and push it through the pipeline for an amendment to the conditional use permit. He emphasized for them to evaluate the impact of the descent decree. He understood that having it move forward would have some validity if the property did not have the extensive history of litigation. He pointed out the descent decree declared that, if there was any question of what it should be, it needed to go back to District Court for interpretation.

BOARD DISCUSSION
6:40 PM

Liechti wanted to see the FCU move forward so that they could see if the application was sufficient. It was the administrator's job to see if the application was complete [and their job to see if it was sufficient].

Klempel was not comfortable with overriding a court that could override them.

They probably could [move forward] but felt Murray had brought up some points. Mussman was correct in accepting the application but felt the application was incomplete.

Netteberg agreed with Liechti and wanted the opportunity to review the application.

Dyck was concerned about moving forward due to the descent decree until they received clarification from the court. In regards to the insufficient application, it was difficult to approve or deny because the appeal came before the application. He discussed that the county had held up condition #28 after the definition of gravel pit was changed. He said they had to make a decision to decide if the appeal should have happened and do they allow it to move forward or do they move to the legal side of it. He was concerned that the courts were still holding jurisdiction and felt there needed to be clarification as to if they could change the conditions in a CUP. He was going to vote to uphold the appeal.

Netteberg wanted to clarify something that was said earlier. It had been stated that the WVLUAC was an advisory board which the BOA then considered their recommendations. He stated the LUACS tended to be emotionally ran based, on their environment. There were so many other things that the board had to take into account [when making a decision]. They listen to the public. They understood. They did care what happens to this valley.

Dyck wanted the public to realize that they were a volunteer board, who gave of their time. Their purpose was to help the County move forward. He explained that rules and regulations but conditional use permits were usually applications that didn't "fit" and that's what they had to look at and worked with.

**MAIN MOTION ON TO
ADOPT F.O.F.
(APPEAL-20-02)
7:48 PM**

Liechti made a motion, seconded by Netteberg, to deny APPEAL-20-02.

**ROLL CALL TO DENY
APPEAL
(APPEAL-20-02)
7:49 PM**

Motion was tied on a 2-2 roll call vote. Dyck and Klempel dissented.

**COUNTY ATTORNEY
MAKES
DETERMINATION
7:49 PM**

Caitlin Overland, a deputy county attorney whom worked with the planning department, read the regulations that stated that a concurring vote of three members of the board shall be necessary in order to reverse any order, requirement, decision, and determination of the zoning administrator of the appellant on any matter. The fact that the board was at 2-2 split, meant that the decision of the zoning administrator stood. . It would take a 3-1 vote to overturn it, based on what the regulations had to say.

There were questions from the public about protocol to hear the conditional use permit next month. The board, staff, and public all discussed this in detail.

**NEW BUSINESS
7:55 PM**

Mussman informed the board that he will not be attending the next meeting and there will be staff present to answer general/technical questions. The staff report should speak for itself. The meeting will be held at the fairgrounds.

**OLD BUSINESS
7:58 PM**

None

**ADJOURNMENT
7:58 PM**

The meeting was adjourned at approximately 7:58 pm on a motion by Dyck. The next meeting will be held at 6:00 pm on August 4, 2020.



Cal Dyck, Chairman



Angela Phillips, Recording Secretary

APPROVED AS SUBMITTED/CORRECTED 8 / 4 / 2020